16, 2003, the Court of Federal Claims granted the government's motion for summary judgment, denied petitioners' motion for summary judgment, and ordered the entry of judgment in the government's favor. *Franklin Sav. Corp.* v. *United States*, 56 Fed. Cl. 720 (2003). The Federal Circuit affirmed in an unpublished opinion. *Franklin Sav. Corp.* v. *United States*, 97 Fed. Appx. 331 (Fed. Cir. 2004). This Court recently denied certiorari in that case. 125 S. Ct. 1694 (2005).

b. In the meantime, on February 8, 2000, petitioners filed the present action as another adversary proceeding in the bankruptcy court, reasserting their tort claims seeking $820 million. As the jurisdictional basis for their claims, petitioners invoked Section 106 of the Bankruptcy Code, 11 U.S.C. 106.[1]

The bankruptcy court granted the defendants' motion to dismiss the complaint. Pet. App. 46a. The bankruptcy court held that petitioners' claim was barred by the doctrine of res judicata, explaining that the complaint was "virtually identical" "with respect to the actual parties, allegations, and legal claims" asserted in the *Franklin III* action. *Id.* at 34a, 37a-41a.

3. The district court affirmed the bankruptcy court's res judicata ruling. Pet. App. 18a-30a. The district court rejected petitioners' argument that the res judicata bar did not apply because petitioners had asserted 11 U.S.C. 106 as a new jurisdictional basis for their new complaint. The court explained that this theory was "contrary to the doctrine of claim preclusion." Pet. App. 29a.

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[1] Various federal agencies beginning in 1991 had filed proofs of claims against FSC. 00-6029 Complaint 4-6 (Bankr. D. Kan. filed Feb. 8, 2000).

The district court further held that Section 106 did not provide petitioners with an avenue for suing the United States in tort under Kansas state law, because Congress had made clear that the FTCA is the "exclusive remedy for tort claims against the United States." Pet. App. 29a. The district court explained that, "[a]ssuming Franklin Savings meets the requirements of § 106(b) * * * , that section merely provides a waiver of sovereign immunity; Franklin Savings must still point to a source of law for its causes of action." *Ibid.*

4. The court of appeals affirmed. Pet. App. 1a-17a. The court did not reach the question of whether the complaint was barred by res judicata. Instead, the court held that the case was properly dismissed because it was barred by the FTCA's statute of limitations, 28 U.S.C. 2401(b), which provides that a tort claim against the federal government shall be forever barred if it is not presented to the relevant federal agency within two years of accrual and filed in district court within six months of denial by the agency. Pet. App. 6a-7a. Because petitioners did not dispute that their claims (which involved events that transpired between 1990 and 1992) had expired before the present action was commenced in 2000, the court of appeals held that the claim was barred. *Id.* at 10a, 17a.

The court of appeals explained that the FTCA supplies the relevant limitations period because that Act "provides the exclusive avenue to assert a claim sounding in tort against the United States." Pet. App. 7a-8a (citing 28 U.S.C. 2679(a)). The court of appeals accordingly rejected petitioners' argument that the waiver of sovereign immunity contained in Section 106 of the Bankruptcy Code renders inoperative the pro-

visions of the FTCA, including its statute of limitations and exclusions. *Id.* at 11a-12a. The court explained that "Section 106 is simply a waiver of sovereign immunity; it does not create a claim for relief." *Id.* at 12a. The court of appeals also observed that "[i]t would be extraordinarily unfair to the United States if the mere filing of a proof of claim in a bankruptcy proceeding subjected it to liability for untimely claims, leaving it without recourse to the usual protections from stale claims available to it in any other, non-bankruptcy proceeding." *Id.* at 16a.

## ARGUMENT

Petitioners seek review of the court of appeals' determination that the waiver of sovereign immunity set forth in Section 106 of the Bankruptcy Code does not vitiate the substantive provisions of the FTCA, including its statute of limitations. The court of appeals correctly decided that the action was barred by the FTCA's statute of limitations, Pet. App. 6a-7a, and petitioner's tort claims in any event would be barred by the FTCA's discretionary function exception and principles of res judicata. The petition therefore does not warrant this Court's review.

1. a. Petitioners do not dispute that all of their claims sound in tort and that their claims may not be brought under the FTCA, because the claims are untimely under 28 U.S.C. 2401(b), and because—as the Tenth Circuit held in petitioner's prior action—they are barred by the Act's exception for discretionary functions, 28 U.S.C. 2680(a). Pet. App. 4a, 5a, 34a, 39a. Petitioners nonetheless argue (Pet. 10) that because Section 106 independently waives the United States's

sovereign immunity from suit, their action may be maintained. That contention is fundamentally unsound.

There are two prerequisites to the imposition of liability against the United States: a waiver of sovereign immunity *and* a source of substantive law that establishes a cause of action against the United States. *FDIC* v. *Meyer*, 510 U.S. 471, 483-484 (1994); *United States Postal Serv.* v. *Flamingo Indus. (USA) Ltd.*, 540 U.S. 736, 742-744 (2004). Although Section 106 contains, as its title indicates, a waiver of sovereign immunity, it does not itself confer a right of action against the United States (much less one for alleged torts). Quite to the contrary, Congress in 1994 amended Section 106 to make explicit that "*[n]othing in this section shall create any substantive claim for relief or cause of action not otherwise existing under* this title, the Federal Rules of Bankruptcy Procedure, or *nonbankruptcy law*." 11 U.S.C. 106(a)(5) (emphasis added); see Bankruptcy Reform Act of 1994, Pub. L. No. 103-394, Tit. I, § 113, 108 Stat. 4117.

The conclusion that Section 106 creates no liability is further confirmed by the requirement that claims against the United States under Section 106 must be "property of the estate," 11 U.S.C. 106(b) and (c). The property of the estate generally consists of "all legal or equitable interests of the debtor in property as of the commencement of the case," *i.e.*, the filing of the bankruptcy petition. 11 U.S.C. 541(a)(1). Absent the bankruptcy petition and petitioners' reliance on Section 106, petitioners have no tort claims against the United States by virtue of 28 U.S.C. 2401(b)—and by virtue of the discretionary function exception, 28 U.S.C. 2680(a), under which the court of appeals held in *Franklin III* that petitioners' tort claims are barred (see 180 F.3d

1130-1142). Yet petitioners are attempting in the bankruptcy case to enlarge the rights of the estate by creating tort liability where none previously existed.

Other than state law, petitioners do not point to any source of "nonbankruptcy law" imposing substantive liability on the United States for torts. Pet. 8. State law, however, generally provides no cause of action against the United States. *M'Culloch* v. *Maryland*, 17 U.S. (4 Wheat.) 316, 426 (1819); *Hancock* v. *Train*, 426 U.S. 167, 178-179 (1976). Indeed, the Supremacy Clause preempts any state law purporting to establish tort liability on the part of the United States in this case. Here, Congress made unmistakably clear that litigants in petitioners' position may not recover on tort claims against the United States. Thus, Congress directed that any "tort claim against the United States *shall be forever barred*" when not presented within two years of a claim's accrual or within six months of an administrative denial of the claim. 28 U.S.C. 2401(b) (emphasis added). Congress likewise barred tort claims when based on an exercise of the government's discretionary function. 28 U.S.C. 2680(a). Finally, Congress provided that the FTCA remedy "is *exclusive* of any other civil action or proceeding for money damages by reason of the same subject matter against the employee whose act or omission gave rise to the claim." 28 U.S.C. 2679(b)(1) (emphasis added); accord 28 U.S.C. 2679(a); see also *FDIC* v. *Meyer*, 510 U.S. at 476; *United States* v. *Smith*, 499 U.S. 160, 161-162 (1991).

It is therefore irrelevant in this case that the FTCA in part incorporates standards of state law. *FDIC* v. *Meyer*, 510 U.S. at 478 (noting that the FTCA incorporates the "law of the place" where the act or omission occurred). While the FTCA, like some other federal

statutes, incorporates state law as the appropriate standard of liability, *Congress* itself, in the FTCA, established the United States' liability for the torts of federal employees as a matter of federal law subject to a range of conditions, limitations, and exceptions that are independent of the provisions of state law. See 28 U.S.C. 2674 ("The United States shall be liable * * * ."); *Key Tronic Corp.* v. *United States*, 511 U.S. 809, 818 n.11 (1994). Petitioners cannot point to any statute that imposes substantive liability on the United States for tort actions independent of the FTCA. That failure is fatal, because the FTCA unquestionably bars the claims in this case

There is, in short, no basis to conclude that Congress intended Section 106 to subject the United States in bankruptcy proceedings to new and unprecedented forms of liability that, outside of bankruptcy, are explicitly precluded under the statutes defining the contours of governmental liability. Thus, if, as petitioners suggest, the provisions of the FTCA defining the scope of the liability of the United States were not relevant under Section 106, the result in bankruptcy court would bear no resemblance to that outside bankruptcy court. Instead, by filing for bankruptcy, debtors facing a proof of claim by the federal government would be in a substantially more favorable position than their counterparts outside bankruptcy, possessed of causes of action unavailable to those who do not file a petition. Petitioners have pointed to no statutory language or legislative history under the Code supporting such a

bizarre and anomalous result, and the plain language of Section 106(a)(5) explicitly precludes it.[2]

b. Petitioners argue (Pet. 15-17) that the court of appeals erroneously held that the FTCA provides a cause of action when, in their view, the FTCA solely reflects a waiver of sovereign immunity. As discussed above, however, absent Congress's affirmative establishment in the FTCA of the United States' liability for certain torts as a matter of federal law and the resulting cause of action against the United States, the FTCA's waiver of sovereign immunity from suit alone would be insufficient. Pp. 9-11, *supra*.

That conclusion is also reflected in the terms and structure of the FTCA. Thus, 28 U.S.C. 1346(b)(1) confers jurisdiction of federal district courts and waives the sovereign immunity of the United States for tort claims, "[s]ubject to the provisions of chapter 171," *i.e.*, 28 U.S.C. 2671-2680. See *United States* v. *Mitchell*, 463 U.S. 206, 212-216 (1983) (construing Tucker Act grant of jurisdiction as a waiver of sovereign immunity, subject to substantive liability standards created elsewhere). The provisions of Sections 2671-2680, including the exceptions set forth in Section 2680, create and define the scope of the United States' substantive tort liability.

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[2] Contrary to petitioners' contention, reading Section 106 in accordance with its plain terms, *i.e.*, to waive sovereign immunity but otherwise not to expand the scope of tort liability of the United States beyond that set forth in the FTCA, does not render Section 106(b) and (c) "meaningless." Pet. 11. Those Code provisions represent a waiver of sovereign immunity. Thus, they make clear that the bankruptcy court may hear an action against a state governmental entity. Similarly, the provisions permit bankruptcy courts to hear tort claims against the federal government notwithstanding 28 U.S.C. 1346(b)(1), which grants district courts "exclusive jurisdiction" to hear tort claims against the United States.

Because they are incorporated into Section 1346(b)(1), they are *also* conditions on the waiver of sovereign immunity. Thus, Section 2680 provides that *neither* the "provisions of this chapter" (*i.e.*, the FTCA's substantive provisions), *nor* Section 1346(b) (*i.e.*, the waiver of sovereign immunity) apply to claims falling within the exceptions. Those provisions thus reflect congressional intent both to waive sovereign immunity and to impose substantive tort liability on the United States, but only under the precise conditions set forth in the Act.

Petitioners also err in asserting a conflict between the decision below and decisions stating that the FTCA does not create a new cause of action. Pet. 15-16. The decisions cited by petitioners stand for a proposition as to which there is no dispute in this case: that the tort liability to which the United States subjected itself in the FTCA is limited to traditional common-law tort liability reflected in state law, and does not extend to novel tort claims not recognized under the state tort law applicable to private persons.[3] *Feres* v. *United States*, 340 U.S. 135, 141-142 (1950) (finding that the FTCA does not provide a basis for a soldier on active duty to sue the United States for negligence because a private person in like circumstances would not be liable under state law); *In re Orthopedic Bone Screw Prod. Liab. Litig.*, 264 F.3d 344, 362 (3d Cir. 2001) (explaining that state law generally defines the extent of the United States' liability under the FTCA), cert. denied, 535 U.S. 1095 (2002); *Florida Auto Auction of Orlando, Inc.* v. *United States*, 74 F.3d 498, 502 (4th Cir. 1996) (concluding that an alleged breach of duty under

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[3] The government discusses this principle in depth in its merits brief in *United States* v. *Olson*, No. 04-759 (filed Apr. 25, 2005).

Federal law does not, by itself, state a valid tort claim under the FTCA); *Howell* v. *United States*, 932 F.2d 915, 917 (11th Cir. 1991) ("Congress's chief intent in drafting the FTCA was simply to provide redress for ordinary torts recognized by state law.") (citation omitted); *Myers* v. *United States*, 17 F.3d 890, 894 (6th Cir. 1994) (FTCA "constitutes consent to suit and is fundamentally limited to cases in which 'a private individual [would be liable] under like circumstances.'") (quoting 28 U.S.C. 2674). None of those decisions holds, as petitioners urge, that a simple waiver of sovereign immunity, standing alone, is sufficient to render the United States liable for a state law cause of action. A fortiori, none of those decisions supports the proposition that the United States may be liable for tort damages under circumstances explicitly precluded by the FTCA itself.

2. Petitioners further assert that there is a "well-developed" conflict of authority on the question presented. Pet. 9. But most of the cases upon which they rely are distinguishable from the present case. And the one case that does conflict with the decision below is the subject of a pending petition for rehearing en banc. Review by this Court is therefore not warranted at this time.

Petitioners cite four cases from other courts of appeals that they contend are in conflict with the decision below: *Anderson* v. *FDIC*, 918 F.2d 1139 (4th Cir. 1990); *Ashbrook* v. *Block*, 917 F.2d 918 (6th Cir. 1990); *In re Town & Country Home Nursing Servs., Inc.*, 963 F.2d 1146 (9th Cir. 1992); and *In re Supreme Beef Processors, Inc.*, 391 F.3d 629 (5th Cir. 2004). The first three of those decisions were decided before Congress in 1994 amended Section 106 to state that it

does not "create any substantive claim for relief or cause of action not otherwise existing under * * * non-bankruptcy law." 11 U.S.C. 106(a)(5). To the extent that the decisions are inconsistent with that provision, they have lost their validity, and those circuits should have the opportunity to consider the issue in light of Congress's subsequent enactment.

Equally important, *Anderson*, *Ashbrook*, and *Town & Country*, do not involve the question of whether the *substantive* requirements and limitations of the FTCA, including the statute of limitations or the discretionary function exception apply to actions brought under Section 106. Those decisions held that a debtor is not required to comply with the *procedural* requirement of exhausting administrative remedies before filing an FTCA claim under Section 106. *Anderson*, 918 F.2d at 1143; *Ashbrook*, 917 F.2d at 921-923; *Town & Country*, 963 F.2d at 1154-1155. Whether or not those decisions are correct, they do not fundamentally alter the substantive scope of the government's tort liability. For instance, the FTCA does not require exhaustion of administrative remedies when tort claims against the United States are brought as compulsory counterclaims. 28 U.S.C. 2675(a).[1]

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[1] Although the FTCA's exhaustion requirement is excused for counterclaims, 28 U.S.C. 2675(a), that rule applies to compulsory, not permissive counterclaims. *Northridge Bank* v. *Community Eye Care Ctr., Inc.*, 655 F.2d 832, 836 (7th Cir. 1981). The government respectfully disagrees with *Anderson*, *Ashbrook*, and *Town & Country* to the extent that they hold that Section 106 eliminates the need to exhaust administrative remedies for tort claims brought as permissive counterclaims. See H.R. Rep. No. 595, 95th Cong., 1st Sess. 317 (1977) (Congress intended in Section 106 "to achieve approximately the same result that would prevail outside of bankruptcy"). *Anderson* also addressed the requirement that FTCA suits be filed against the United

Petitioners, by contrast, urge the far broader contention that Section 106 expands the substantive liability of the United States, by vitiating the substantive limitations on governmental liability set forth in the FTCA. *Anderson*, *Town & Country*, and *Ashbrook* do not squarely address that issue and thus would not be in square conflict with the court of appeals' decision even if they had not been superceded by the enactment of 11 U.S.C. 106(a)(5) in 1996. Indeed, *Ashbrook* appears to be consistent with the decision below in this regard. In *Ashbrook*, the Sixth Circuit affirmed the dismissal of a purported *Bivens* claim against the United States on sovereign immunity grounds, notwithstanding the waiver of sovereign immunity set forth in Section 106. *Ashbrook*, 917 F.2d at 924. The court thus appears to have recognized the need to apply relevant substantive limitations on the United States' liability when analyzing counterclaims brought under Section 106.[5]

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States rather than particular agencies, holding that requirement, like the exhaustion requirement, inapplicable to counterclaims filed under Section 106. 918 F.2d at 1143-1144. This Court need not reach this issue, which was not addressed by the court of appeals below. We note, however, that the government also respectfully disagrees with *Anderson* in this regard, because FTCA suits must be brought against the United States, not its agencies. 28 U.S.C. 1346(b), 2679(a).

[5] For those reasons, petitioners also mistakenly argue (Pet. 14-15) that the decision below conflicts with *University Medical Center v. Sullivan*, 973 F.2d 1065 (3d Cir. 1992), which was decided before the 1994 Amendments to Section 106, and does not involve the question of whether Section 106 vitiates the substantive requirements of the FTCA. Rather, *Medical Center* holds that district courts have jurisdiction to hear claims that the Department of Health and Human Services violated the Bankruptcy Code's automatic stay provision, 11 U.S.C. 362, even though the plaintiff did not exhaust administrative remedies as required for claims arising under the Medicare Act, 42 U.S.C. 405(h). The court reasoned that the hospital's claim "arises under the

Petitioners emphasize that in *In re Supreme Beef Processors, Inc.*, *supra*, the Fifth Circuit applied Section 106(c) to permit the assertion of a tort claim for setoff even if it would be barred by the FTCA's statute of limitations or one of the exceptions in 28 U.S.C. 2680. 391 F.3d at 633-636 (permitting suit even though action would have been barred as untimely under the FTCA and barred by the Act's exception for intentional torts, and its requirement of administrative exhaustion). The government, however, has filed a petition for rehearing en banc in *In re Supreme Beef Processors, Inc.*, and the Fifth Circuit ordered the plaintiff to file a response to that petition. Order, No. 03-41345 (5th Cir. Jan. 24, 2005). If rehearing is granted, the conflict between *In re Supreme Beef Processors, Inc.* and the decision below may disappear entirely. Thus, while at some future time the issue raised by petitioners may warrant this Court's review, certiorari is premature in the absence of a certain and square conflict on the issue.

3. Finally, the present case would be a poor vehicle for certiorari because, even if the court of appeals had misconstrued Section 106 (which it did not), petitioners' complaint would still have been properly dismissed under the doctrine of res judicata or claim preclusion. As the district court and the bankruptcy court both concluded, the complaint in the present action involves the identical parties, alleged facts, and requested relief as the complaint in *Franklin III*, which was dismissed

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Bankruptcy Code and not under the Medicare statute." 973 F.2d at 1073. Significantly, the court did not rely on Section 106 as a basis for imposing liability on the United States. Rather, the court recognized that Section 106 waived immunity from suit and that the automatic stay provision was the basis for the substantive source of liability. *Medical Ctr.*, 973 F.2d at 1085-1087.

under Fed. R. Civ. P. 12(b)(6). Pet. App. 21a, 34a. Although the court of appeals did not reach the issue, the district court and the bankruptcy court correctly recognized that petitioners' new invocation of Section 106 of the Bankruptcy Code is insufficient to defeat the res judicata bar. Pet. App. 29a-30a, 40-41a.

Petitioners have repeatedly invoked the resources of the bankruptcy court, the district court, the Court of Federal Claims, the courts of appeals, and this Court in an unrelenting attempt to find some legal theory that will entitle them to relief. Agencies of the United States began to file proofs of claim in the bankruptcy proceedings as early as 1991 when a claim was filed on behalf of the Office of Thrift Supervision. See note 1, *supra* (Complaint 4). That was well before the district court dismissed their tort claims in 1997. Petitioners could have sought to rely on Section 106 as an independent basis for recovery in that case but they failed to do so and raised that issue for the first time in the court of appeals, which found the claim waived. Petitioners may not circumvent their default in failing to raise that claim by filing a new complaint in bankruptcy court. The doctrine of res judicata (claim preclusion) exists to prevent just such a drain on the resources of the courts and the parties. See *Montana* v. *United States*, 440 U.S. 147, 153-154 (1979) ("To preclude parties from contesting matters that they have had a full and fair opportunity to litigate protects their adversaries from the expense and vexation attending multiple lawsuits, conserves judicial resources, and fosters reliance on

judicial action by minimizing the possibility of inconsistent decisions.").[6]

## CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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JULY 2005

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[6] Although the United States assumed for the sake of argument, solely for purposes of the appeal, that Section 106(b) is applicable here, that issue has not yet been resolved by the courts below. The United States argued to the bankruptcy court that Section 106(b) is inapplicable because petitioners' claims do not arise out of the same transaction or occurrence as the government's claims against the bankruptcy estate. 11 U.S.C. 106(b). Should this case be remanded, the government would expect to reassert that argument.

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No. 04-1462

IN THE

# Supreme Court of the United States

FRANKLIN SAVINGS CORP. *et al.*,

*Petitioners,*

v.

UNITED STATES *et al.*,

*Respondents.*

**On Petition for a Writ of Certiorari to the United States Court of Appeals for the Tenth Circuit**

## REPLY BRIEF

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## REPLY BRIEF

The government concedes that the decision below squarely conflicts with a decision of the Fifth Circuit. As the Petition further demonstrates, the decision below conflicts with the decisions of at least three other courts of appeals on one issue, and decisions of this Court and four courts of appeals on a second issue. And the government fails to dispute that the issue presented is both important and worthy of the Court's attention. Instead, it briefly argues that review "is ... not warranted at this time," Opp. 14, and spends only slightly more time contending that the circuit split is not as deep as Petitioners assert, *id.* at 14-17. But it devotes virtually its entire effort to arguing the underlying facts and merits, *id.* at 4-8, 8-13, 17-18,[1] instead of addressing whether certiorari should be granted to resolve the acknowledged and unquestionable conflict in the circuits presented in the petition. Page limits do not permit a full opportunity to respond to all of the government's arguments for affirmance, but in the process of answering the government's few points that are directed to certiorari, Petitioners will demonstrate why the government's most extreme claims do not withstand scrutiny. In the end, it is plain that this Court's review is necessary to resolve the multiple conflicts on important questions of federal law that are presented in this case.

### I. THE DECISION BELOW CONFLICTS DIRECTLY WITH A DECISION OF THE FIFTH CIRCUIT, AS THE GOVERNMENT CONCEDES.

The Petition shows, Pet. 10-11, and the government agrees, that the decision below stands in square conflict with the Fifth Circuit's decision in *Zayler* v. *USDA (In re Supreme Beef Processors)*, 391 F.3d 629 (5th Cir. 2004). In *Zayler*, the

[1] For instance, the government mistakenly asserts that Franklin Savings was a "failed" institution. On the contrary, it is res judicata that FSA was in capital compliance at the time a conservator was appointed. *FSC* v. *OTS*, 303 B.R. 488, 500-01 (D. Kan. 2004).

Fifth Circuit rejected the government's argument that a claim can proceed under 11 U.S.C. § 106 only if it meets the statute of limitations embedded in the Federal Tort Claims Act (FTCA). See 391 F.3d at 635-36. That holding conflicts directly with the decision below, in which the Tenth Circuit accepted the government's argument foursquare, and held that the FTCA's statute of limitations applies to claims brought under § 106. See Pet. App. 13a; see generally *id.* 12a-17a.

The government does not dispute that the issue presented is important. In fact, it appears to concede as much, arguing only that review "is ... not warranted *at this time*." Opp. 14 (emphasis added). This is with good reason. As the Petition shows, Pet. 17-20, this case presents important issues related to the scope of the United States' sovereign immunity and the jurisdiction of the federal courts—issues as to which the current state of disuniformity is illogical, unjust and intolerable. For exactly these reasons, this Court repeatedly has granted review to construe the FTCA, as the government itself recently has argued, see Petition for a Writ of Certiorari at 22-23, *United States* v. *Olson*, No. 04-759 (U.S. filed Dec. 3, 2004) (noting grants of certiorari in FTCA cases), *cert. granted*, 125 S. Ct. 1591 (2005).

The government's sole response to this admitted conflict is that the Court should not grant certiorari because the government has sought rehearing en banc in *Zayler*. Opp. 17. This is a slim reed indeed. *First*, it is most unlikely that the Fifth Circuit will grant rehearing en banc. That court, in the twelve months ending June 30, 2004, handled nearly 8,500 cases, but reheard only 11 cases en banc—approximately one one-thousandth of its docket. See United States Court of Appeals for the Fifth Circuit, *Statistical Snapshot, at* http://www.ca5.uscourts.gov/clerk/APPENDIXIREV.pdf (visited July 12, 2005). *Second*, this argument is no basis to deny certiorari in any event. The logical consequence of the argument—even were it not premised on infinitesimal odds—is that this petition should be held pending the Fifth Circuit's resolution of

*Zayler*.[2] *Third*, as the following section demonstrates, review of this case is warranted in any event: Even leaving aside *Zayler*, there exists a square conflict between the decision below and decisions of the Fourth, Sixth and Ninth Circuits.

## II. THE DECISION BELOW CONFLICTS WITH DECISIONS OF THE FOURTH, SIXTH AND NINTH CIRCUITS CONCERNING THE RELATIONSHIP BETWEEN § 106 AND THE FTCA.

As explained in the Petition, the holding of the Tenth Circuit in this case conflicts with *Anderson* v. *FDIC*, 918 F.2d 1139 (4th Cir. 1990); *Ashbrook* v. *Block*, 917 F.2d 918 (6th Cir. 1990); and *Sullivan* v. *Town & Country Home Nursing Services, Inc. (In re Town & Country Home Nursing Services, Inc.)*, 963 F.2d 1146 (9th Cir. 1991). See Pet. 11-13.[3] In each of those three cases, the court of appeals held that the limitations that attend an action brought under the auspices of the FTCA do not apply to a claim brought under § 106. *Anderson*, 917 F.2d at 1143-44; *Ashbrook*, 917 F.2d at 922-24; *Sullivan*, 963 F.2d at 1153-54. That reasoning directly conflicts with the decision below, which held that the FTCA's limitations *do* apply to claims brought under § 106.

1. The government seeks to distinguish *Anderson*, *Ashbrook* and *Sullivan* in two ways. It first argues that those cases concern whether a debtor proceeding under § 106 must "comply with the *procedural* requirement of exhausting administrative remedies." By contrast, the government contends, the decision below relates to "the *substantive* requirements and limitations of the FTCA, including the statute of

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[2] Petitioners will inform the Court immediately if the Fifth Circuit takes further action in *Zayler* during the pendency of this petition.

[3] And, as the Petition notes, the conflict is exacerbated by a decision of the Third Circuit applying the same reasoning in a closely analogous context, *see University Med. Ctr.* v. *Sullivan (In re Univ. Med. Ctr.)*, 973 F.2d 1065, 1072-73 (3d Cir. 1992), and it is mirrored by widespread confusion in the bankruptcy courts, *see* Pet. 14-15 & n.7.

limitations or the discretionary function exception." Opp. 15. This supposed distinction between "substantive" and "procedural" requirements is wholly of the government's own creation, and appears nowhere in the cases. Rather, each case states generically and holds categorically that the FTCA's limitations are inapplicable to claims brought under § 106. For example, in *Anderson*, 918 F.2d at 1144, the court stated in blanket fashion that "by the assertion of its claim against the estate, the FDIC waived the protections it otherwise enjoys, both under the doctrine of sovereign immunity and under the Tort Claims Act."[4] This language is clear, and invites no distinction between procedure and substance. These precedents apply to the FTCA's statute of limitations just as they do to the FTCA's exhaustion requirement, and in so doing, conflict with the decision below.

The existence of this conflict is confirmed, and the fallacy of the government's claimed distinction between "substantive" and "procedural" requirements highlighted, by the government's inability to support this proposed distinction with any principle of law or logic. Instead, it baldly asserts that there is such a distinction, an approach that this Court has expressly rejected: "Except at the extremes, the terms 'substance' and 'procedure' precisely describe very little except a dichotomy, and what they mean in a particular context is largely determined by the purposes for which the dichotomy is drawn." *Sun Oil Co.* v. *Wortman*, 486 U.S. 717, 726 (1988).[5]

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[4] *See also Sullivan*, 963 F.2d at 1155 ("At the time of the Bankruptcy Code's passage, Congress was aware that its prior enactments, such as the FTCA, had already prescribed certain conditions for the government's waiver of sovereign immunity. The legislative history of section 106 indicates that Congress meant to alter this landscape by subjecting the government to an automatic exposure to liability as the price of its participation in the distribution of the bankruptcy estate."); *Ashbrook*, 917 F.2d at 923.

[5] *Sun Oil* also holds that a statute of limitations may be "procedural" for purposes of the Full Faith and Credit Clause. 486 U.S. at 728-29.

Moreover, in this context, there is no basis to characterize the statute of limitations as substantive but the exhaustion requirement as procedural, because the FTCA intertwines the two requirements. A tort claim brought under the auspices of the FTCA must first be exhausted with the relevant agency. 28 U.S.C. § 2675. This exhaustion requirement is subject to a two-year statute of limitations, and any subsequent civil suit must be filed within six months after the agency denies the administrative claim. *Id.* § 2401(b). Given this close relationship between the FTCA's statute of limitations and its administrative exhaustion requirement, there is no meaningful basis for describing one of the requirements as substantive and the other procedural. Absent this contrived distinction, the conclusion is inescapable that the decisions of the Fourth, Sixth and Ninth Circuits are flatly inconsistent with the Tenth Circuit's decision in this case. That conflict warrants this Court's review.

2. The government next seeks to narrow the conflict by arguing, Opp. 14-15, that the contrary decisions of the Fourth, Sixth and Ninth Circuits were abrogated by the 1994 enactment of § 106(a)(5). That subsection provides that § 106 does not "create any *substantive claim for relief* or *cause of action* not otherwise existing under this title, the Federal Rules of Bankruptcy Procedure, or nonbankruptcy law" (emphasis added). The government's theory, largely unexplained, appears to be that if the FTCA's statute of limitations does not apply to § 106 claims, this broadening of federal tort liability amounts to "creat[ing] [a] substantive claim for relief or cause of action," in contravention of § 106(a)(5). See, *e.g.*, Opp. 16. This argument depends upon the mistaken assertion that § 106 can in no way "expand[] the substantive liability of the United States," *id.*, and relies upon a misinterpretation of the statute's terms.

Section 106(a)(5) simply does not mean that liability under § 106 can never be broader than under other waivers of sovereign immunity (as would be the case, for instance, by hold-

ing inoperative the FTCA's statute of limitations to § 106 claims). Rather, it merely provides that § 106 does not create a "claim for relief" or a "cause of action." These terms have well defined meanings that differ markedly from what the government suggests—*viz.*, they are "[a] group of operative facts giving rise to one or more bases for suing" or a "legal theory of a lawsuit." *Black's Law Dictionary* 235 (8th ed. 2004) (defining "cause of action"); Fed. R. Civ. P. 8(a) (referring to "claim for relief" as "an original claim, counterclaim, cross-claim, or third-party claim"). In short, § 106(a)(5) states explicitly what is implicit in § 106(b) and (c)—that § 106 is only a waiver of sovereign immunity, and does not create a new right of action. That the FTCA's statute of limitations does not apply to claims brought under § 106 in no way means that § 106 is "creat[ing]" a claim for relief or a cause of action; it simply means that certain *existing* causes of action (specifically, claims arising under state law that may be brought against the government because of the § 106 waiver of sovereign immunity) carry a different limitations period than they would if they were brought pursuant to the FTCA.

The error in the government's interpretation of § 106(a)(5) is confirmed by the fact that it would render § 106(b) and (c) superfluous. Pet. 11. If, as the government contends, § 106(a)(5) means that § 106 can in no way "expand[] the substantive liability of the United States" beyond what the FTCA already permits, Opp. 16, then those provisions are surplusage. See *Zayler*, 391 F.3d at 636; *Anderson*, 918 F.2d at 1143-44. It is no response to argue, as the government does, that there is no such problem because § 106(b) and (c) operate to grant the bankruptcy courts jurisdiction over "action[s] against a state governmental entity" and "tort claims against the federal government." Opp. 12 n.2. It would be unusual indeed if Congress intended to confer jurisdiction on the bankruptcy courts, not by saying "the bankruptcy courts shall have jurisdiction," but instead by enacting statutory provisions that speak purely about sovereign immunity, as

§106(b) and (c) do. And it would be all the more surprising if this were the purpose of those provisions, when § 106(a)(2) specifically grants the bankruptcy courts such jurisdiction. See 11 U.S.C. § 106(a)(2) ("The court may hear ...."). In short, the government's argument on this score falls entirely flat. Section 106(a)(5) in no way abrogates *Ashbrook*, *Anderson* and *Sullivan*, which remain good law; those cases stand in direct conflict with the decision below; and they therefore confirm the need for this Court's review.

## III. THE DECISION BELOW FURTHER CONFLICTS WITH DECISIONS OF THIS COURT, AND OF THE THIRD, FOURTH, SIXTH AND ELEVENTH CIRCUITS, CONCERNING THE NATURE AND PURPOSE OF THE FTCA.

In addition to the conflict concerning the relationship between the FTCA and § 106, the Petition also demonstrates that the decision below conflicts with decisions of multiple courts—including this Court—as to whether the FTCA is itself a cause of action. Pet. 15-17. The decision below erroneously treated the FTCA as a "source" of "substantive" law—i.e., a cause of action. The government does not dispute this fact, nor could it. See Pet. App. 8a ("That outside source [of law] is the FTCA when, as here, the claim sounds in tort."). What is more, the government itself appears to embrace this position, as it refers to the FTCA as "impos[ing] substantive liability on the United States," Opp. 11, and as "creat[ing] ... the United States' substantive tort liability," *id.* at 12.

In direct conflict with the decision below, this Court and others have expressly held that the FTCA "is *not* the creation of new causes of action." *Feres* v. *United States*, 340 U.S. 135, 141 (1950) (emphasis added). The language of the courts of appeals is, like *Feres*, flatly unambiguous. See, *e.g.*, *In re Orthopedic Bone Screw Prod. Liab. Litig.*, 264 F.3d 344, 362 (3d Cir. 2001) ("the FTCA does not itself create a substantive cause of action"); *Florida Auto Auction of Or-*

*lando, Inc.* v. *United States*, 74 F.3d 498, 502 (4th Cir. 1996) ("The [FTCA] does not create new causes of action ...."); Pet. 16-17 (quoting additional cases). In short, there can be no reasonable dispute that these decisions conflict with the decision below.

The government's sole response is a distraction. There is no conflict, it argues, because these decisions merely stand for the proposition that the federal government's tort liability is limited to "traditional common-law tort liability" applicable to private persons, and "does not extend to" other forms of liability, such as liability that is imposed upon state and municipal entities. Opp. 13. Even assuming this is true, it is beside the point.[6] That these decisions may address "private-person" liability hardly means that they cannot also address the predicate question whether FTCA creates a cause of action. And, it is manifestly plain from the language quoted above that they do exactly that. These cases squarely hold that the FTCA is not a substantive cause of action, but merely a waiver of sovereign immunity that permits state-law claims to be brought against the United States. In this regard they conflict squarely with the decision below, and further confirm the need for this Court's review.

## IV. THE GOVERNMENT'S ADDITIONAL ARGUMENTS PROVIDE NO BASIS FOR DENYING REVIEW.

The remainder of the government's brief concerns itself with the underlying merits of the case. These arguments are beside the point. That the government thinks it has the better of the merits does nothing to eliminate the problem that this case would not have been dismissed if it had arisen in the more than 20 States encompassed within the four circuits that conflict with the Tenth Circuit.

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[6] It is undisputed that the claims brought by Franklin Savings pass this private-plaintiff test.